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E-filed on March 5, 2015

7 Attorneys for the United States Trustee for Region 17
TRACY HOPE DAVIS

8 **UNITED STATES BANKRUPTCY COURT**

9 **DISTRICT OF NEVADA**

10 In re:

11 FLAMINGO-PECOS SURGERY
12 CENTER, LLC, DBA SURGERY
13 CENTER OF SOUTHERN NEVADA,

14 Debtor.

15 Case No: BK-S-14-18480-ABL

16 Chapter 11

17 Date: March 18, 2015

Time: 11:00 a.m.

Place: ABL-Courtroom 1, Foley Federal Bldg.

18 **THE UNITED STATES TRUSTEE'S OBJECTION TO THE MOTION FOR ORDER**
APPROVING THE EMPLOYMENT OF MARQUIS AURBACH COFFING AS
SPECIAL COUNSEL TO DEBTOR NUNC PRO TUNC TO THE PETITION DATE

19 To the Honorable August B. Landis, United States Bankruptcy Judge:

20 Tracy Hope Davis, United States Trustee for Region 17 (the "United States Trustee"), by
and through her undersigned counsel, hereby files this objection (the "Objection") to the

21 *Application for Order Approving the Employment of Marquis Aurbach Coffing as Special
Counsel to Debtor Nunc Pro Tunc to the Petition Date* (the "Application") filed by Flamingo-

22 Pecos Surgery Center, LLC (the "Applicant").¹ [ECF No. 55].

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25
26 ¹ Hereafter, all references to "Section" in the Motion are to provisions of the Bankruptcy
27 Code, 11 U.S.C. section 101 et. seq., unless otherwise indicated. All references to "FRBP" are to
28

1 The Court should deny the relief requested in the Application for the following reasons:

- 2 • The Application does not comply with FRBP 2014(a) because it does not disclose
3 that the Applicant’s counsel, Zachariah Larson, Esq. (“Mr. Larson”) and Shara L.
4 Larson, Esq. (“Ms. Larson”) were both formerly employed at Marquis Auerbach
5 Coffing (“MAC”). The Application and the *Declaration of Chen M. Juan, Esq. in
support of the Application* [ECF No. 56] incorrectly state that “neither MAC, nor
6 any attorney thereof . . . have any present or prior connection with Debtor, its
7 creditors, . . . [or] its *respective attorneys* and accountants.” [ECF No. 55, p. 4 of
8 11, lns. 22-27; ECF No. 56, p. 3 of 7, lns. 19-24] (emphasis added);
9
- 10 • The Application does not meet the Ninth Circuit’s governing legal standard to
11 obtain a *nunc pro tunc* order approving the Applicant’s employment;
12
- 13 • The Application does not establish the reasonableness of the terms and conditions
14 set forth in the Application nor in the Representation Agreement it incorporates.

15 The Objection is based on the following memorandum of points and authorities and any
16 argument that the Court may entertain with respect to the Objection.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **ARGUMENT**

19 **A. The Application Does Not Disclose All Connections Required by 11 U.S.C. §
20 327 and FED. R. BANKR. P. 2014**

21 1. In order to properly discharge their judicial functions, bankruptcy courts rely on
22 professionals’ voluntary, complete, and truthful compliance with FRBP 2014 and 2016 as they
23 seek approval for their employment. “Though [Rule 2014] allows the fox to guard the proverbial
24 hen house, counsel who fail to disclose timely and completely their connections proceed at their
25 own risk because failure to disclose is sufficient grounds to revoke an employment order and
26 deny compensation.” *West Delta Oil Co.*, 432 F.3d 347, 355 (5th Cir. 2005) (quoting *In re*

27 the Federal Rules of Bankruptcy Procedure. All references to “ECF No.” are to the numbers
28 assigned to the documents filed in the case as they appear on the docket maintained by the clerk
of the United States Bankruptcy Court for the District of Nevada.

Crivello, 134 F.3d 831, 836 (7th Cir. 1998)).

2. Proper disclosure enables a court to determine whether an applicant “hold[s] or represent[s] an adverse interest to the estate” and whether the applicant is a “disinterested person.” 11 U.S.C. § 327(a); *Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995). “All facts that may be pertinent to the Court’s determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed.” *Id.* at 882. *See also Park-Helena*, 63 F.3d at 882 (“The duty of professionals is to disclose all connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest . . . They cannot pick and choose which connections are irrelevant or trivial. . . No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it.”).

3. The Ninth Circuit applies the disclosure requirements of FRBP 2014 and 2016 “strictly.” *Park–Helena*, 63 F.3d at 880-81. “[T]he disclosure rules are not discretionary.” *Mehdipour v. Marcus & Millichap (In re Mehdipour)*, 202 B.R. 474, 480 (B.A.P. 9th Cir. 1996). Failure to disclose is alone a sufficient basis for denying a professional’s compensation and employment. See *In re Film Ventures Int’l, Inc.*, 75 B.R. 250, 252 (B.A.P. 9th Cir. 1987).

4. Here, the Application does not comply with FRBP 2014(a) because it does not disclose that the Applicant’s counsel, Mr. Larson and Ms. Larson, were both formerly employed by MAC.² Instead, the Application and the *Declaration of Chen M. Juan, Esq. in support of the*

² As disclosed in the document attached hereto as “Exhibit A,” Ms. Larson has previously declared to the Court: “I am an associate with the law firm of Marquis Aurbach Coffing.” (See “Exhibit A,” p. 1 of 6, ln. 25). Similarly, as disclosed in the document attached hereto as “Exhibit B,” Mr. Larson has previously declared to the Court: “I am an attorney with the law firm of Marquis Aurbach Coffing.” (See “Exhibit B,” p. 1 of 2, ln. 22).

1 Application [ECF No. 56] incorrectly report that “neither MAC, nor any attorney thereof . . .
2 have any present or prior connection with Debtor, its creditors, . . . [or] its respective attorneys
3 and accountants.” [ECF No. 55, p. 4 of 11, lns. 22-27; ECF No. 56, p. 3 of 7, lns. 19-24]
4 (emphasis added).
5

6 5. Because the Application fails to meet the standards required by Section 327(a)
7 and FRBP 2014(a), the Court should enter an order denying the Application.

8 **B. The Application Does Not Meet the Ninth Circuit’s Governing Legal
9 Standard to Obtain a *Nunc Pro Tunc* Employment Order.**

10 6. “Court approval of the employment of counsel for a debtor in possession is *sine*
11 *qua non* to counsel getting paid. Failure to receive court approval for the employment of a
12 professional in accordance with § 327 and Rule 2014 precludes the payment of fees.” *DeRonde*
13 *v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (B.A.P. 9th Cir. 1992) (citation omitted).

14 7. “There is no unjust hardship in requiring attorneys to observe the strict
15 requirements of § 327 because professionals are charged with knowledge of the law.” *In re*
16 *Downtown Investment Club III*, 89 B.R. 59, 63-64 (9th Cir. BAP 1988).

17 8. The Ninth Circuit has limited the grant of retroactive employment orders, like that
18 sought here by the Applicant, to cases in which exceptional circumstances are demonstrated.
19 *Occidental Fin. Group, Inc. (In re Occidental Fin. Group, Inc.)*, 40 F.3d 1059, 1062 (9th Cir.
20 1994).

21 9. “To establish the presence of exceptional circumstances, professionals seeking
22 retroactive approval must satisfy two requirements: they must (1) satisfactorily explain their
23 failure to receive prior judicial approval; and (2) demonstrate that their services benefitted the
24

1 bankrupt estate in a significant manner.” *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d
2 970, 974 (9th Cir. 1995).

3 10. Here, the Application does not cite, let alone argue, either of these two *Atkins*
4 factors. 69 F.3d 970, 974.

5 11. Accordingly, the Application fails to make the showing required for *nunc pro*
6 *tunc* relief in the Ninth Circuit. On this basis alone, the Court has sufficient grounds to deny the
7 Application and should enter an order denying it.

8 **C. The Application Does Not Establish the Reasonableness of the Terms and
9 Conditions Set Forth in the Application or in the Representation Agreement
10 it Incorporates.**

11 12. The Application and the Representation Agreement it incorporates seek
12 authorization to employ and compensate MAC pursuant to Section 327(a) and apparently not
13 pursuant to Section 328. [ECF No. 55, p. 1 of 11, lns. 23-25].

14 13. In the Ninth Circuit, unless a retention application unambiguously specifies that
15 Section 328 governs, a professional’s applications for compensation are reviewed under Section
16 330. *See Circle K. Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K. Corp.)*, 279
17 F.3d 669, 674 (9th Cir. 2002) (“In this Circuit, unless a professional is unambiguously employed
18 pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To
19 ensure that § 328 governs the review of a professional’s fees, a professional must invoke the
20 section explicitly in the retention application.”).

21 14. The Application does not unambiguously specify that it seeks to employ MAC
22 pursuant to Section 328 as well as Section 327. Accordingly, the Application should be not
23 viewed as requesting Section 328 approval and MAC’s compensation applications set forth in
24

1 the Application and Representation Agreement should be reviewed pursuant to Section 330.
2

3 15. Even if the Court were to find that the Application has sufficiently invoked
4 Section 328, however, it is not sufficient to simply invoke Section 328 in the Application; the
5 proponent of the Application must demonstrate that terms and conditions set forth in the
6 Application are reasonable. *See In re Gillett Holdings, Inc.*, 137 B.R. 452, 455 (Bankr. D. Colo.
7 1991) (assigning to movant the burden of proof to provide specific evidence that proposed terms
8 and conditions in retention application there were in the best interests of the bankruptcy estate);
9 *In re Potter*, 377 B.R. 305, 307-08 (Bankr. D. N.M. 2007) (“The trustee seeking to employ a
10 professional under 11 U.S.C. § 328 bears the burden of showing that the provisions of the
11 proposed employment are reasonable.”)

13 16. Section 330 of the Bankruptcy Code provides that “[a]fter notice to the parties in
14 interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329,
15 the court may award to a … professional person employed under section 327 … (A) reasonable
16 compensation for actual, necessary services rendered by the … attorney and by any
17 paraprofessional person employed by any such person; and (B) reimbursement for actual,
18 necessary expenses.” 11 U.S.C. § 330(a)(1).

20 17. Here, the Application, the Representation Agreement incorporated therein, and
21 the accompanying *Declaration of Chen M. Juan* all provide proposed compensation rates for
22 “Associates/Shareholders/Of Counsel” and “Law Clerks/Paralegals.” [ECF Nos. 55 at p. 5 of 11;
23 56 at pp. 4 & 6 of 7]. These proposed rates appear to conflict with the provisions in the
24 Application that provide for compensation pursuant to Sections 330 and 331. [ECF No. 55 at p.
25 5 of 11, ln. 13]. Because the Applicant has not expressly invoked Section 328 in seeking
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1 approval of these compensation rates, and because the Applicant has not demonstrated their
2 reasonableness, the Court should disallow them.

3 18. Moreover, even if the Applicant were to seek its compensation rates under
4 Section 330, “Law Clerks” are not professionals and cannot be compensated as such.
5 Administrative staff, including “Law Clerks,” are properly designated as overhead, which is not
6 compensable under Section 330. *See, e.g., In re ACT Mfg., Inc.*, 281 B.R. 468, 484-85 (Bankr. D.
7 Mass. 2002) (“[T]ime spent by certain types of individuals should ordinarily not be included in a
8 fee application. This includes time spent by nonpaid interns, summer associates, and staff whose
9 salaries can ordinarily be viewed as part of a firm's overhead compensated via the rates of the
10 firm's professionals and paraprofessionals.”). For this additional reason, the Court should
11 disallow the compensation rates proposed by the Applicant.

14 19. Finally, the Court should reject two additional provisions of the Representation
15 Agreement that is incorporated into the Application: (1) the “1½%” interest increase/late fee [*see*
16 ECF No. 56, p. 6 of 7, ¶ 4]; and (2) the “TERMINATION” provision. [*See* ECF No. 56, p. 7 of
17 7, ¶ 11].

19 20. The Application does not provide any evidence that “1½%” interest increase/late
20 fee is reasonable. The Court should therefore disallow it. Only the Court may award fees to a
21 professional. 11 U.S.C. § 330.

23 21. Similarly, the Court should disallow the provision of the Representation
24 Agreement that provides for termination of representation and withdrawal without notice to all
25 parties and without leave of the Court. [ECF No. 56, p. 7 of 7, ¶ 11]. At a minimum, the Court
26 should require the Applicant to clarify this provision so that any withdrawal by MAC complies
27

1 with the Local Rules of Practice of the District Court, District of Nevada, which require Court
2 approval before counsel is allowed to withdraw. See L.R. IA 10-6 (b) ("No attorney may
3 withdraw after appearing in a case except by leave of Court after notice has been served on the
4 affected client and opposing counsel.").

5
6 WHEREFORE, for all of the foregoing reasons the Court should enter an order (1)
7 sustaining the Objection and (2) denying the relief requested in the Application.

8
9 Respectfully submitted,

10 TRACY HOPE DAVIS
11 UNITED STATES TRUSTEE

12 By: /s/ Jonas V. Anderson
13 Jonas V. Anderson, Esq.
14 Attorney for the United States Trustee
United States Department of Justice

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3 **EXHIBIT A**
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1 **Marquis Aurbach Coffing**
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4 ZACHARIAH LARSON, ESQ.
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6 SHARA L. LARSON, ESQ.
7 Nevada Bar No. 7786
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6 702) 382-0711
7 Proposed Attorneys for Debtor and Debtor in Possession

E-Filed;

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
FORSMAN, INC.

Debtor.

Case No: 12-11748-lbr
Chapter: 11

Hearing Date: March 21, 2012
Hearing Time: 2:00 p.m.

**DECLARATION OF SHARA L. LARSON, ESO, IN SUPPORT OF APPLICATION FOR
ORDER APPROVING THE EMPLOYMENT OF MARQUIS AURBACH COFFING AS
ATTORNEYS FOR DEBTOR**

SHARA L. LARSON, ESQ., hereby declares as follows:

1. I am over the age of 18 and mentally competent. I have personal knowledge of the facts in this matter and if called upon to testify, could and would do so. I make this declaration (the "Larson Declaration") in support of Debtor's Application for Order Approving the Employment of Marquis Aurbach Coffing as Attorneys for Debtor.

2. I am an attorney and counselor at law, admitted to practice in the courts of the State of Nevada and in the above-captioned Court.

3. I am an associate with the law firm of Marquis Aurbach Coffing ("MAC") and maintain an office for the practice of law at 10001 Park Run Drive, Las Vegas, Nevada 89145.

4. Neither I nor any of the partners or employees of MAC has any present connection with Forsman, Inc. ("Debtor"), a Nevada corporation, or its creditors or other parties-

1 in interest other than as follows:

- 2 a. On or about December, 2001 through the present, MAC has represented the
3 Debtor in various transactional and state court litigation matters.
- 4 b. MAC has also represented Debtor's president, John E. Forsman, individually and
5 in his capacity as president of the Debtor in various transactional and state court
6 litigation matters.
- 7 c. Prior to commencing representation of Debtor, pre-petition, MAC discussed with
8 Debtor its primary creditors and reviewed the initial creditor and equity security
9 lists to determine any prior or present representation of creditors or parties-in-
10 interest. From such initial review, MAC has identified certain present or previous
11 representations of creditors or parties-in-interest in unrelated matters and has
12 disclosed to Debtor that MAC does not believe it has any conflict in regards to
13 any previous or representations of creditors or parties in interest.
- 14 d. Prior to filing the above-captioned matter, no non-debtor related entity (insider or
15 otherwise) was a known creditor of MAC; and any representation of non-debtor
16 related entity (insider or otherwise) is currently known to be represented by MAC.

17 5. MAC is not a creditor, an equity security holder, or an insider of Forsman, Inc.

18 MAC is not and was not, within two years before the date of the filing of the petition, a director,
19 officer, or employee of Forsman, Inc. Furthermore, MAC does not have an interest materially
20 adverse to the interest of the estate or any class of creditors or equity security holders, by reason
21 of any direct or indirect relationship to, connection with, or interest in, Forsman, Inc., or for any
22 other reason.

23 6. To the best of my knowledge, MAC and its shareholders and associates do not
24 hold or represent any interest adverse to the Debtor's bankruptcy estate and MAC and its
25 shareholders and associates are disinterested within the meaning of Section 101(14) of the
26 Bankruptcy Code. Additionally, MAC does not have any connection with the U.S. Trustee or
27 any person employed by the U.S. Trustee. MAC's representation of Debtor will not be adverse
28 to Debtor's estate.

1 7. Pursuant to MAC's legal representation of Debtor and as set forth in the
2 Schedules and Statements in Debtor's Petition, pre-petition MAC received \$50,000.00 from the
3 Debtor, as an initial retainer ("Initial Retainer") for this bankruptcy case. Of that Initial Retainer
4 \$13,954.00 has been applied pre-petition towards any and all pre-petition tasks performed for the
5 completion of the Chapter 11 schedules and statements. \$1,046.00 has been applied to filing fees
6 associated with the filing. Therefore, after the fees and costs were deducted from the Initial
7 Retainer, a balance of \$35,000.00 remains in the Retainer Account.

8 8. MAC has entered into an Attorney Fee Agreement ("Retainer Agreement") with
9 the Debtor. A true and correct copy of the Retainer Agreement is attached hereto as Exhibit 1.

10 9. As set forth in the Retainer Agreement, the compensation of MAC's attorneys and
11 staff are proposed at varying rates currently ranging from \$70.00 per hour to \$450.00 per hour.

12 10. MAC may seek interim compensation during this case subject to application and
13 approval by this Court pursuant to Sections 330 and 331 of the Bankruptcy Code.

14 11. Neither the Firm nor I, insofar as I have been able to ascertain, and other than
15 disclosed herein: (a) hold or represent any interest adverse to the Debtor, its estate; or any class
16 of its creditors; or (b) represent any other entity in connection with this case having an interest
17 adverse to the Debtor.

18 12. Based on the foregoing, I believe MAC and its members and associates thereof
19 are disinterested persons within the meaning of Sections 101(14) and 327 of the Bankruptcy
20 Code.

21 I declare under penalty of perjury under the laws of the United States (28 U.S.C. §1746)
22 that the foregoing is true and correct.

23 Dated this 16 day of February, 2012.

Shara Larson
SHARA L. LARSON, ESQ.

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3 **EXHIBIT D**
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1 **Marquis Aurbach Coffing**
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 600 N. Airport Road, LLC

E-Filed: 9/14/12

8
UNITED STATES BANKRUPTCY COURT
 9
FOR THE DISTRICT OF NEVADA

11 In re:
 12 600 N. AIRPORT ROAD, LLC
 13
 14 Debtor.

Case No.: BK-S-12-14766-lbr

Chapter 11

Date: OST requested for September 26, 2012
 Time: 1:30 p.m.

16 **DECLARATION OF ZACHARIAH LARSON, ESQ. IN SUPPORT OF ORDER**
 17 **SHORTENING TIME RE: DEBTOR'S MOTION TO SELL REAL PROPERTY, FREE**
 18 **AND CLEAR**
OF ALL LIENS AND ENCUMBRANCES, HIRE REALTOR AND PAY COMMISSIONS

19 Zachariah Larson, Esq., declares and states as follows:

20 1. I am over the age of 18, am mentally competent, have personal knowledge of the
 21 facts in this matter, and if called upon to testify, could and would do so.

22 2. I am an attorney with the law firm of Marquis Aurbach Coffing, counsel for
 23 Debtor and Debtor-in-possession, 600 N. Airport Road, LLC and duly licensed to practice law in
 24 the State of Nevada.

25 3. I make this Declaration in support of the Application for Order Shortening Time
 26 in order to set a hearing on an Order Shortening Time Re: Debtor's Motion to Sell Real Property,
Free and Clear of all Liens and Encumbrances, Hire Realtor and Pay Commissions ("Motion").

27
 28 4. A hearing on Debtor's Application to Employ Internet Auctioneer, bkassets.com,

1 Pay Commission to Auctioneer in addition to Motion to Sell Real Property at Internet Auction is
 2 currently scheduled for September 26, 2012 at 1:30 p.m. [Court Docket 26].

3 5. A hearing on Creditor, FH Partners, LLC's Motion for Relief from Stay or in the
 4 Alternative Motion to Dismiss is currently scheduled for September 26, 2012 at 1:30 p.m. [Court
 5 Docket 40].

6 6. The Debtor respectfully requests that said Motion be heard on an Order
 7 Shortening Time and at the same time as the hearings already on calendar in this case as there is
 8 inadequate time to hear this Motion in the ordinary course.

9 7. Time is of the essence as there are related hearings currently scheduled for
 10 September 26, 2012 at 1:30 p.m.

11 8. The sale is scheduled to close on or before September 28, 2012.

12 9. The Debtor is informed and believes that the buyer will withdraw their offer to
 13 purchase if this motion is not approved and/or closing achieved prior to September 28, 2012.
 14 The Debtor therefore requests that the Motion be heard on September 26, 2012 to allow for the
 15 closing to take place no later than Friday, September 28.

16 10. Notice can be shortened pursuant to Bankruptcy Rule 9006(c)(1) and LR 9006(a).

17 11. Based upon the foregoing, the Debtor requests that the Court issue an order
 18 shortening time to hear the Motion.

19 12. For the reasons more particularly set forth in the Motion, the Debtor respectfully
 20 requests that said Motion be heard on an Order Shortening Time, as it feels good cause exists to
 21 shorten time for notice of hearing on the instant Application.

22 Pursuant to 28 U.S.C.A. 1746, I declare under penalty of perjury under the laws of the
 23 United States of America that the foregoing is true and correct.

24 DATED, this 14th day of September, 2012.

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/s/ Zachariah Larson
 Zachariah Larson, Esq.
 Attorney(s) for Debtor